Supreme Court, U.S.
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No. 03-983

IN THE

Supreme Court of the United States

JAMES B. JONES, SR.,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

Although Norfolk concedes that the Ohio state courts were required to apply federal law, it ignores the fact that the Ohio state courts relied upon ***Ohio*** law when setting aside the jury's verdict in favor Jones. *See* Pet. App. A-6 through A-7, A-14. Not surprisingly, Norfolk does not even address the very reason Jones seeks certiorari in this case.

Realizing the error of the Ohio state courts, Norfolk argues that "'regardless' there is no substantive distinction between Ohio law and the federal standard established in *Brady*." Resp. Brf. p.7, n.3 (emphasis added). Thus, Norfolk argues that the Ohio state courts "did not diverge in any respect from *Brady* . . . ." Resp. Brf. p.7. The *Brady* standard, however, was a precursor to the governing *Lavender* standard, which this Court specifically designed to safeguard a railroad employee's right to a jury determination under FELA. The very outcome in this case is what this Court sought to prevent nearly sixty years ago.

Conceding *Lavender's* precedential value, Norfolk next argues that "there is no substantive distinction between *Brady* and *Lavender*, or between either of those decisions and Ohio law . . . ." Resp. Brf. p.4. The *Lavender* opinion itself, however, is proof that there ***is*** a crucial difference. In *Lavender*, this Court specifically rejected Missouri state law, which parallels Ohio law and the *Brady* standard. Unlike Ohio law and the *Brady* standard, the *Lavender* analysis simply consists of determining whether there are ***any*** probative facts to support the jury's conclusion–***period***. *Lavender v. Kurn*, 327 U.S. 645, 653-53 (1946). Where there are such facts, a court must abide by the jury's conclusion otherwise it improperly deprives the railroad employee of his federal right to jury trial.

At both the close of Jones' case and at the close of trial, the Ohio trial court determined that Jones had presented enough evidence of Norfolk's negligence to justify submission of the case to the jury. In FELA cases, a court must submit a case to the jury if there is even the slightest evidence of negligence on the part of the railroad. *Rogers v. Missouri Pac. R. R. Co.*, 352 U.S. 500, 506 (1957).[1] In other words, an employee need only produce "evidence scarcely more substantial than pigeon bone broth" to reach the jury. *Harbin v. Burlington N. Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990). The burden is "featherweight." *Ferrara v. A.& V. Fishing, Inc.*, 99 F.3d 449, 453 (1st Cir. 1996). Consequently, only "slight" or "more than a scintilla . . . but not much more" evidence of negligence creates a jury question on the issue of railroad liability. *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 810 (6th Cir. 1996). Because Jones exceeded FELA's requisite burden of proof, the trial court properly submitted the case to the jury.

Once a case is submitted to the jury, this Court has determined (through a succession of FELA cases decided after *Brady* and resulting in the *Lavender* standard) that the essence of the jury's function is to select from conflicting inferences and conclusions that which the ***jury*** considers most reasonable. *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35 (1944). A court ***cannot*** re-weigh the evidence and set aside the jury's verdict merely because it might draw a contrary inference or

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[1] *See also Ulfik v. Metro-North Commuter R. R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991); *Brown v. CSX Transp. Inc.*, 18 F.3d 245, 248 (4th Cir. 1994); *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 685 (7th Cir. 1995); *Martinez v. Union Pac. R.R. Co.*, 82 F.3d 223, 228 (8th Cir. 1996); *Law v. General Motors Corp.*, 114 F.3d 908, 912 (9th Cir. 1997); *Missouri Pac. R.R. Co. v. Kansas Gas & Elec. Co.*, 862 F.2d 796, 800 (10th Cir. 1988).

feel that another conclusion is more reasonable. *Lavender*, 327 U.S. at 653; *Tennant*, 321 U.S. at 35. Moreover, a court should not assume that in determining questions of negligence the jury would fall short of a fair performance of its constitutional function. *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949). Thus, an appellate court's function is exhausted where there is an evidentiary basis for the jury's verdict. *Lavender*, 327 U.S. at 653. In other words, a court may only set aside the jury's verdict where there is a complete absence of probative facts to support the jury's conclusion. *Id.*

The jury's function was not respected in this case. The Ohio state courts improperly invaded the jury's function because there were probative facts to support the jury's conclusion. At trial, Norfolk never disputed that it had a duty to provide Jones a safe workplace and sufficient manpower. Jones then established that Norfolk knew or should have reasonably foreseen that his back injury was likely given Norfolk's knowledge of the risks associated with his job. In fact, the trial court concluded that Norfolk knew of both "the risks inherent in the heavy work conducted by Mr. Jones," and of "the risk of *back* injury posed by work ordinarily taken on by [Jones]." Pet. App. A-21, A-18 (emphasis added). Jones next established that Norfolk breached its duties by allowing Jones to work short-handed, and offering insufficient "safety huddles." Finally, Jones established, by way of expert medical testimony, that Norfolk's negligence caused in whole or in part his repetitive back injury.

Because there were probative facts to support the jury's conclusion that Norfolk was negligent, and that its negligence caused in whole or in part Jones' injury, the Ohio state courts were required to abide by the jury's conclusion under *Lavender*. The fact that the

Ohio state courts might have drawn a contrary inference or felt that another conclusion was "more reasonable" is irrelevant. Clearly, these courts either disagreed with or refused to recognize this Court's governing precedent. Consequently, the Ohio state courts erroneously set aside the jury's verdict and, therefore, improperly deprived Jones of his federal right to a jury determination under FELA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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